"That you jointly with three others still at large on November 1, 1972, between about 1.00 a.m. and 4.00 a.m., that is between the hours of sunset and sunrise, at house No. 420 Kampong Pertama, Bukit Tengah, in the District of Bukit Mertajam, in the State of Penang, in furtherance of a common intention of all, robbed one Tan Ah Heok, a female Chinese of one pair gold ear-ring valued at $20 and cash $400 and at the time of committing the said robbery were armed with a deadly weapon, to wit, a pistol, and thereby committed an offence punishable under sections 392 and 397 of the Penal Code read with section 34 of the said Code."

He was undefended at the trial. At the end of the case the jury brought in a unanimous verdict of guilty. The learned judge concurred in the verdict, convicted the appellant and sentenced him to 10 years' imprisonment and six strokes, such sentence to run from the date of expiry of the last date of his then period of imprisonment. The appellant had 19 previous convictions.

The appeal was argued before us on two grounds. The first ground was that a fair trial of the appellant was prejudiced by reason of the fact that he was kept hand-cuffed throughout the trial. The second ground of appeal was that the verdict of the jury was unreasonable and could not be supported having regard to the evidence of identification by PW7 and PW8 which was the only evidence to connect the appellant with the offence.

We dismissed the appeal because we found no merit in either of the grounds. It was said in connection with the first ground that the learned trial judge erred in law in allowing the application by the Deputy Public Prosecutor to have the appellant hand-cuffed during the trial. It was further said that the appellant's being hand-cuffed throughout the trial must have inevitably prejudiced the jury against him. It was lastly said that the appellant's being hand-cuffed also indirectly showed him to be a person of bad character in that his having to be hand-cuffed indirectly implied that he was a person of violent disposition or a known dangerous criminal. All this, it was argued, resulted in the appellant suffering a miscarriage of justice.

As an accused person is presumed to be innocent until he is proved guilty, it is not the normal practice to put any restraint on him when he appears before a court to be tried for a criminal offence. Some sort of restraint, however, may become necessary where the accused is violent or has committed a crime of violence or may have attempted to escape. In the present case the learned Deputy Public Prosecutor applied for permission of the court to have the accused hand-cuffed during the trial as he had made several attempts to escape. The court granted such permission. The application was made before the jury was selected. In the circumstances, we were of the view that there was nothing wrong in the judge granting the application and that the trial of the appellant was in no way prejudiced.

As regards the second ground of appeal, we did not think that there was anything irregular in the identification parades at which PW7 and PW8 identified the appellant as the person who had committed the offence with which he was charged. Four other persons were brought before the identification parade, but they failed to identify the appellant. The learned judge, after summing-up at some length the evidence in relation to the identification parades, warned the jury that if there was any suspicion that the appellant was wrongly identified he was entitled to an acquittal. Later in his summing-up he directed the jury as follows:

"When you consider the whole evidence you have got to apply your minds to the evidence as a whole. Has the identification by PW7 and PW8 established beyond reasonable doubt that the accused was one of the four intruders who committed the robbery. If you have any doubt in your own mind about that, the accused is entitled to the benefit of the doubt and an acquittal."

In the light of those directions to the jury we were of the opinion that the summing-up of the learned judge was not open to any criticism.

In the result we dismissed the appeal.

Appeal dismissed.

Solicitors: *Karpal Singh, Wong & Co.*

U.N. FINANCE BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Suffian L.P., Ong Hock Sim F.J. & Chang Min Tat J.) Ju.y 3, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 165 of 1974]

Income Tax — Company buying and selling shares — Whether company carrying on business of dealing in shares or making investments in shares — Purchase of shares in housing company — Whether purpose of purchase relevant — Question of fact determined by Special Commissioners — Whether court can interfere — Losses incurred by company through their branch in Singapore — Whether deductible — Double Taxation Relief (Republic of Singapore) Order, 1966, art. IV(1)(a) — Income Tax Act 1967, ss. 4(a) and 40.

In this case the appellants were a finance company whose objects *inter alia* were the accumulation of capital by means of monthly subscriptions or otherwise and also by borrowing money from members, depositors and others. They also had powers to acquire movable and immovable properties by way of investment with a view to resale. The appellants bought and sold shares in a number of companies and in respect of the sale of some shares made a profit on which they were assessed to tax. They contended that the purchasing of the shares was made as a long term investment and the profits made were capital in nature being realization of capital investments. The appellants incurred losses through their branch in Singapore and sought to have these losses taken into account in arriving at their chargeable income. The Special Commissioners held that in buying and selling shares the appellants were carrying on the business of dealing in shares as an adventure or concern in the nature of trade and that the profits realized by the appellants were assessable to tax and they also held that the appellants were entitled to deduct their trading losses in Singapore from their income derived in Malaysia. On appeal it was held in the High Court ([1975] 1 M.L.J. 109) that the Special Commissioners were justified on the facts in arriving at the decision that the appellants were carrying on a business of dealing in shares and therefore that the profits from the sale of the shares were assessable to tax. It held however that the Special Commissioners had erred in law in arriving at the decision that the losses of the Singapore branch were deductible from income of the appellants derived in Malaysia. On appeal to the Federal Court,

Held, dismissing the appeal: (1) there was evidence, which if accepted, amply supported the finding of the Special Commissioners that the appellants were carrying on the business of dealing in shares as an adventure or concern in the nature of trade;

(2) the learned judge of the High Court was correct in holding that the losses of the Singapore branch could not be taken into consideration in ascertaining the appellant's total income for the year of assessment 1968.

Cases referred to:-

(1) *Punjab Co-operative Bank Ltd.* v. *C.I.T.* 8 I.T.R. 635, P.C.

(2) *General Re-insurance Co. Ltd.* v. *Tomlinson* [1970] 1 W.L.R. 566.

(3) *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* 73 C.L.R. 604.

(4) *Northern Insurance Co.* v. *Russell* (1889) 2 T.C. 551.

(5) *Brice* v. *Northern Assurance Co.* and *The Liverpool & London and Globe Insurance Co.* v. *Bennett* 6 T.C. 327.

(6) *Californian Copper Syndicate* v. *Harris* 5 T.C. 159.

(7) *J.P. Harrison (Watford)* v. *Griffiths* 40 T.C. 281.

(8) *The National Bank of Australasia Ltd.* v. *Federal Commissioner of Taxation* [1969] A.T.C. 4042.

(9) *Cooksey & Bibbey* v. *Rednall* 30 T.C. 514.

(10) *Rutledge* v. *Commissioner of Inland Revenue* 14 T.C. 490.

(11) *Loxton* v. *Federal Commissioner of Taxation* 71 A.T.C. 4001.

(12) *Case A 35* (1969) A.T.C. 201.

(13) *N.Y.F. Realty Sdn. Bhd.* v. *C.I.R.* [1974] 1 M.L.J. 182.

(14) *Taylor* v. *Good* [1974] 1 All ER. 1137.

(15) *Edwards* v. *Bairstow* 35 T.C. 207.

(16) *Tebrau (Johore) Rubber Syndicate Ltd.* v. *Farmer* 5 T.C. 658.

(17) *The Dunn Trust Ltd.* v. *Williams* 31 T.C. 477.

(18) *Mitchell Brothers* v. *Tomlinson* 37 T.C. 224.

(19) *Commissioners of Inland Revenue* v. *Livingstone* 11 T.C. 538.

(20) *Whimster & Co. Ltd.* v. *I.R.C.* 12 T.C. 813, 823.

(21) *Director-General of Inland Revenue* v. *E.D.C.* [1973] 2 M.L.J. 22; [1974] 2 M.L.J. 65.

(22) *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718.

FEDERAL COURT.

S. D. K. Peddie for the appellants.

Mohamed Nizar bin Idris (Senior Federal Counsel) for the respondent.

Chang Min Tat J.: The appeal by the taxpayer is from the judgment of the High Court (1) in confirming the determination of the Special Commissioners that the profits from the sale of certain investments were not a capital gain but a trading income and assessable to tax and (2) in overruling the decision of the Special Commissioners that the loss sustained by the taxpayer's Singapore branch could be brought in to determine its chargeable income in Malaysia.

The taxpayer is a wholly-owned subsidiary of the United Malayan Banking Corporation Berhad. It was incorporated on July 6, 1962. Its objects are discernible from its name: it is a finance company. It accumulates capital from subscriptions or loans from its members, paying interest thereon and lends out money at interest. It has powers to acquire movable and immovable property by way of investment or with a view to resale.

It commenced business in Malaysia only on November 16, 1964, when it started to receive deposits, after it had increased its paid-up capital on October 20, 1964 to $1,000,000. It commenced business in Singapore on February 1, 1965.

Up to 1969, it had bought and sold shares in eleven companies, both private and public. The transactions have been fully set out in the statement of the case.

In 1964, it held by way of purchases

(a) 56,250 shares, Metropole Realty Sdn. Bhd. at par, *i.e.* at a cost of $56,250.

(b) 500,000 shares, United Estate Projects Sdn. Bhd. at par, i.e. at a cost of $500,000.

(c) 250,000 shares, Overseas Union Enterprise Ltd., 25¢ paid up at $62,500.

No shares were sold in 1964.

From 1965 onwards, it acquired other shares, the most significant for the purpose of this appeal being 2,500,000 shares in United Estate Projects Sdn. Bhd. (U.E.P. in short) at a total cost of $2,578,185. In reality, these shares were bought at par, the odd $78,185 being interest which the holder of the shares who had agreed to hold them for the taxpayer had to pay by way of interest by reason of the delay in the transfer, and who required reimbursement. In the course of the years, certain shares were transferred to Metropole Realty Sdn. Bhd. at costs. Some shares, including those in U.E.P. were sold for a total profit of $1,804,363. Other shares were transferred to the United Malayan Banking Corporation, the parent company, and to the United National Finance (Singapore) Ltd., its sister-branch in Singapore.

It was a finding of fact by the Special Commissioners that the profits realised by the taxpayer on the sales of shares were made in the course of its business as a finance company.

The bone of contention was the U.E.P. shares. The taxpayer did not contend against charging the profits from the sale of other shares to tax. It contended, very seriously, that the profits of

(1) $450,000 from the sale of 750,000 U.E.P. shares to Tropical Investment Ltd. on June 12, 1967; and

(2) $750,000 from the sale of 1,000,000 U.E.P. shares also to Tropical Investment Ltd on May 24, 1968,

which had been assessed to tax for the years of assessment 1968 and 1969 respectively, were capital gains and not a trading income, on the argument that these shares formed part of a holding which was purchased and held for investment. No objection was raised to the assessment on the profits from the sales of other shares.

The background of the purchase of the shares is as follows: One Chang Ming Tien had an agreement to purchase a piece of land some 1,240 acres in area. This land was capable of development as a housing estate. Seven parties, amongst them Chang Ming Tien and the appellant taxpayer, agreed amongst themselves to form a private or limited company to undertake this development and in the meanwhile, to contribute, in all, a sum of $10 million. Towards this sum, Chang Ming Tien contributed $4,750,000 and the appellant $500,000. The company that was formed was The United Estate Projects Ltd. It was not entirely clear

whether the $500,000 contributed by the appellant became the purchase for 500,000 shares in U.E.P. but it would appear not. By private agreement with this Chang Ming Tien, the appellant taxpayer took over subsequently his 2,500,000 shares. Its holdings therefore came to 3,000,000 shares at a total cost of $3,078,185, of which $78,185 had to be written off in order to arrive at the cost at par.

The first contention of the taxpayer was that the shares in U.E.P. were purchased because "one of the lines of our business was the granting of housing loans and our participation in the U.E.P. would generate a loan business to our finance company." Another reason was to hold the shares as a long-term investment.

The second contention was that the sales of the U.E.P. shares on June 12, 1967 and May 24, 1968 were effected because it expected Malaysia to bring in similar legislation as the rumoured Singapore Finance Companies Act restricting investments of finance companies to a percentage of their issued share capital and reserves.

On the facts of the case, the Special Commissioners were of the opinion that —

"in buying and selling shares in the U.E.P. Sdn. Bhd. the appellant was carrying on a business in dealing in shares as an adventure or concern in the nature of trade."

and held the profits assessable to tax under section 4(a) of the Income Tax Act, 1967.

The learned judge before whom the Case Stated was set considered that —

"Bearing in mind the principles enunciated in *Edwards* v. *Bairstow* and *J.P. Harrison* v. *Griffiths*, my task is to determine whether there was reasonable evidence to support the Commissioners' finding that in buying and selling U.E.P. shares the appellants were carrying on a business of dealing in shares as an adventure or concern in the nature of trade."

After reminding himself of what is a question of fact and what is a question of law and the role a court can play in each case, the learned judge thought that it was "fundamentally one of fact" and he found that —

"There was ample evidence to establish that at the time of the purchase of the U.E.P. shares, the appellant company was embarking upon a business activity in pursuit of one of its objects"

He considered that the findings of the Special Commissioners in paragraph 15 of the statement of the case that in buying and selling shares in U.E.P. the appellant was carrying on a business of dealing in shares as an adventure or concern in the nature of a trade, in paragraph 16 that having regard to the dates of the coming into force of the Finance Companies Act Singapore on December 27, 1967 and the sale of the first lot of U.E.P. shares on June 12, 1967 and in paragraph 17 to the inconsistencies of the argument that the sale was prompted by its fears of the impending legislation with every prospect that Malaysia might follow suit (as this country did on June 1, 1969, when the Borrowing Companies Act 1969 was passed), seen in its continuation to buy and sell shares in other companies without regard to the provision of the Malaysian Ordinance, meant necessarily the rejection by the Special Commissioners of the appellant's contention that the U.E.P. shares were bought primarily as an investment.

Before this court, Mr. Peddie argued that the Special Commissioners and the learned judge had failed to appreciate and to give due effect to the nature and reason for the purchase of the U.E.P. shares. He stressed that the shares were not purchased with reserve funds or held by way of reserve funds.

Mr. Peddie's view of the facts of the taxpayer's case was that the shares were purchased not from accumulations of large sums as in an insurance company, but from capital funds and that they did not form accessible funds to meet demands or losses. On these grounds, he distinguished *Punjab Co-operative Bank Ltd.* v. *C.I.T.*,[1] *General Re-insurance Co. Ltd.* v. *Tomlinson*[2] and *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation*.[3] He also submitted that the rule applicable to insurance companies that profits and losses made upon a realisation of investments are in accordance with *Northern Insurance Co.* v. *Russell*[4] usually taken into account in assessing the profits and gains was not of general application. The exceptions to this rule were seen in *Brice* v. *The Northern Assurance Co.* and *The Liverpool & London & Globe Insurance Co.* v. *Bennett*.[5]

He then cited the following passage from the judgment of Clerk L.J. in *Californian Copper Syndicate* v. *Harris*[6] at pages 165/6:

"It is quite a well established principle in dealing with questions of assessment of Income Tax that where the owner of an ordinary investment chooses to realise it and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment but an act done in what is truly carrying on or carrying out of a business."

He considered that the second part of this rule was applicable more to banks and such-like companies but that the case of the appellant fell within the first part.

Mr. Peddie cited a number of other cases. He instanced *J. P. Harrison (Watford) Ltd.* v. *Griffiths*[7] to support his contention that the court must reject the argument that it must look solely at the purchase and sale of the shares and must not look at the intention or expectation of the taxpayer in buying the shares or the result of their initial purchase. This case is of some complexity and has dissenting judgments.

Mr. Peddie also cited *The National Bank of Australasia Ltd.* v. *Federal Commissioner of Taxation*,[8] *Cooksey & Bibbey* v. *Rednall*,[9] *Rutledge* v. *The Commissioner of Inland Revenue*[10] (the toilet paper case), *Loxton* v. *Federal Commissioner of Taxation*,[11] *Case A.35*[12] and *J. P. Harrison (Watford) Ltd.* v. *Griffiths*.[7] These were all cases wherein the facts established that the original intention of the purchase was to hold the purchases as investments. As an example, *Cooksey & Bibbey* v. *Rednall*[9] was a case in which the appellant C, a solicitor and B, a farmer jointly purchased a farm in 1924, 6 miles from Birmingham and let it to a tenant. In 1938 the appellants sold the farm to the Birmingham Corporation and they were jointly assessed to income tax on the profit

as realised. Their background was as follows: Between 1920 and 1925, the firm in which C was a partner purchased and developed three housing estates and from 1930 to 1940 C & B in partnership bought and developed five housing estates. The appellants contended that the farm was purchased as an investment and not for resale and that the profit from the resale was a capital profit. Croom-Johnson J. held that the Commissioners' finding that the purchase and sale of the farm were in the nature of trade and the profit assessable was not justified.

In his judgment, Croom-Johnson J. found and I could not do better than to cite:

"But when I find two gentlemen whose evidence is accepted, saying that they bought this farm for their own occupation and, finding out they could not work it, retained it as an investment, and let it for years and years (it was only when they found such an increase in value ready to hand that they decided to realise), it seems to me to be impossible for the Commissioners to say — there being nothing to the contrary in this case but at most the circumstances that in 1930 they set up a partnership which dealt in other property, which does not appear to have included this property — that this was a transaction in the nature of trade. I think they have misdirected themselves about this. They have directed themselves that, notwithstanding all these facts, they are entitled to set up the circumstance that in 1930 there were transactions in other properties which have nothing to do with this property. I think, in the circumstances, they have misdirected themselves as to the effect of the evidence. I do not think there is evidence to entitle the Commissioners to find as they have found."

There are of course numerous dicta in the judgments in these cases all pointing to the importance of the finding of the intention of the purchase. It is not necessary to review all these cases; it will be sufficient to bear this basis of determination in mind.

If I may so condense his arguments, Mr. Peddie's main contention was that it was fundamentally important to determine the dominant purpose of the purchase in line with the decision, *inter alia*, of *N.Y.F. Realty Sdn. Bhd.* v. *C.I.R.*[13] and that once the dominant purpose of the purchase was to hold the purchase as an investment, that would decide on which side of the line the purchase fell, unless there was evidence on which a finding could be found that the purpose had altered to a profit-making transaction or part of a trading transaction.

The complaint, as I understood learned counsel was that the learned trial judge in referring at all times in his judgment to "buying & selling" when he considered the dealings in shares by the appellant company had failed in his duty to see what was the dominant intention of the company when the U.E.P. shares were bought. That, it was submitted, should be decisive of the question whether the profits were assessable to tax as profits from a trade or an adventure in the nature of a trade or not assessable as capital accretions.

To the question by this court whether he would not then ask for the matter to be remitted back to the High Court or the Special Commissioners to make such an essential finding, learned counsel for the appellant company replied that that course was considered but not followed in *Taylor* v. *Good*.[14] He suggested that this court should follow suit and determine the question on the matter before it. He again repeated his client's contention that the dominant purpose of the purchase of the shares was investment.

It may be trite to say but it will be of use to remind ourselves that an appellate court in income-tax cases has only a limited function to perform. It is bound by the findings of facts by the Special Commissioners and set out in the statement of the case, as stressed by Encik Nizar for Revenue before the High Court, relying on the case of *Harrison* v. *Griffiths, supra, per* Lord Reid at page 296: —

"Where, as in this case, the question is a question of fact, that means that the decision of the Commissioners cannot be reviewed by the court. But if the decision of any tribunal on a question of fact is unreasonable, looking to the facts on which it is based, the court can and must intervene. The question in this case, is, therefore, not whether the Commissioners were wrong but whether their decision was unreasonable."

and *per* Lord Guest at page 303: —

"The finding of the Commissioners cannot be disturbed unless it was arrived at upon a view of the fact which could not reasonably be entertained (*Edwards* v. *Bairstow*, [1966] A.C. 14, *per* Viscount Simonds at page 29 and Lord Radcliffe at pages 36 and 39)."

Reliance was also placed on *Edwards* v. *Bairstow*[15] where Viscount Simonds said at page 224: —

"For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

and at page 225: —

"Yet it must be clear that to say that such an inference is one of fact postulates that the character of that which is inferred is a matter of fact. To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it rightly directed in law what the characteristics are. . . ."

Mr. Peddie conceded his acceptance of this burden on him as counsel for the appellant.

The only question then was whether there was a mistake as to law.

The contention of the appellant company, I repeat was that: —

"We bought shares in the United Estate Projects Limited because one of the lines of our business would be the granting of housing loans and our participation in the United Estate Projects would generate a loan business to our finance company. Another reason was to hold the shares as investment."

Even if the latter reason was not an afterthought as it would appear in the context, the earlier reason could not be supportive of any argument other than, at the best, that a dealer in shares could possibly buy shares not as an investment but for profits if it was in the happy position of ensuring these profits, as contended by Revenue to be the true position in this case.

But, of course, the main contention was the holding of these shares as an investment. The evidence for this must come from the appellant company itself. It is perhaps fortunate that part of the evidence adduced by the appellant company was incorporated in

the record, so that an appellate court while remembering its proper duty in the matter of findings of fact by the Special Commissioners, can nevertheless see whether there was evidence to support such findings.

The appellant company admitted that its paid-up capital on October 20, 1964 was $1 million. (It was only increased to $4 million on May 14, 1971). Up to this date, it had only 2 subscribers' shares of $100 each. On that date 9,998 shares were issued, bringing in $999,800. Four days earlier, it had accepted 2 commitments. Under the Trust Deed referred to earlier dated October 16, 1964, it was obliged to deposit forthwith $300,000 into the trust account to be set up. There was a further obligation to pay in another $200,000 on December 15, 1964. It had also resolved to purchase $500,000 shares in the U.E.P. to be set up. And in fact on October 20, 1964 *i.e.* immediately after the issue of the 9,998 shares, it purchased 300,000 U.E.P. shares at par. As a matter of simple calculation, on the basis, as it would appear, that the $500,000 to be paid into the trust account was a different sum from the $500,000 for the purchase of the U.E.P. shares (which was completed on December 15, 1964), the appellant company had on this date in its coffers only money which came from depositors from November 16, 1964. If that basis was wrong (though there was nothing to suggest it) then it would have in addition to depositors' moneys, the balance of $500,000, less $118,750 paid for the Metropole Realty Sdn. Bhd. and the Overseas Union Enterprise Ltd. shares, and of course administration expenses. The volume of deposits in 1964 was not known but it must be remembered that a financial house had to keep a certain degree of liquidity in considering the contention of the appellant company that it bought the U.E.P. shares for investments. The sources could only come from capital or from a portion of depositors' moneys or from both.

Insofar as the third lot of U.E.P. shares (the 2,500,000 shares purchased on March 30, 1965 from Chang Ming Tien) was concerned, the appellant company frankly admitted that it had not sufficient money to pay the vendor but had to rely on an overdraft from its parent company, the United Malayan Banking Corporation Berhad.

The contention of the appellant company that it bought the U.E.P. shares to generate a loan business for itself from the houses to be built by this U.E.P. Sdn. Bhd. did not appear consistent. In the first place, despite its holdings in U.E.P., the appellant company on December 31, 1965 had to make a considerable loan of $1.5 million to it. This loan was admitted to be made in the course of business. The company did not seek to increase the size of its shareholdings. Secondly, the appellant company could and did make other loans also of considerable sums to other development companies, without any expectation of generating a loan business or without fear that such a loan business would not be generated. It could easily make it a condition of the loan that the borrowers would require the purchasers of these houses to borrow money from the appellant company. It was not a *sine qua non* that shares should be bought to bring in the loan business.

With regard to the sale of the shares, the appellant company suggested that the sale was prompted by the fears it entertained in anticipation of the coming into force of the Finance Companies Act of Singapore and of similar Malaysian legislation. The former came into force in Singapore on December 27, 1967, while the Borrowing Companies Act (M) 1969 was brought into force on June 1, 1969. These legislations were expected to restrict investments of finance companies to a fraction of their issued share capital and reserves. The contention was that the sales were not motivated by any necessity to meet depositors' withdrawals or to provide a sufficient margin of liquidity. The absence of any necessity for the sale was advanced as proof of the holding as investments. But the evidence was there, that despite these fears the appellant company went on buying shares in other companies, and where its holding *e.g.* of the Malaysia-Hong Kong Development Co., Sdn. Bhd. could be approved on application to Bank Negara, failed to or refused to make such application. Its actions in respect of shareholdings were therefore contrary to its contention that it sold the U.E.P. shares because of the Borrowing Companies Act and if the disbelief generated by this contradiction with regard to the sale affected its veracity in regard to the purchase, the appellant company really had itself to blame.

On the evidence and on the evidence of other purchases and sales of shares in companies, both public and private, in the context of the fact that as provided in the Articles of Association one of the activities of the appellant company was trading in shares, the Special Commissioners came to a specific finding in their words that "in buying and selling shares in the U.E.P. Sdn. Bhd. the appellants were carrying on a business of dealing in shares as an adventure or concern in the nature of trade."

There was evidence, which if accepted, amply supported this finding. The learned judge held so and with respect, having regard to the evidence which we had been permitted to see, he could not have come to any other conclusion.

In view, however, of Mr. Peddie's criticism, it is necessary to examine this finding to see what exactly it meant. To my mind, it was in 2 parts. The first part referred to the buying of the U.E.P. shares as being in the course of a business of dealing in shares. This meant that the Special Commissioners rejected the contention that the shares were bought as an investment. There was evidence, as I said, which if accepted, would support it. The Special Commissioners accepted it and took the view, which I could only regard as being the correct one, that objectively, the evidence established a trade.

This being so, the complaint of Mr. Peddie that both the Special Commissioners and the learned judge had failed to make any finding of a change in the intention of the appellant company fell to the ground since it was fundamental to the argument that the finding was that the shares were bought as an investment. The cases he cited on this point, *Tebrau (Johore) Rubber Syndicate Ltd. (in liquidation)* v. *Farmer (Surveyor of Taxes)*,[16] *The Dunn Trust Ltd. (in volun-*

tary liquidation) v. *Williams (H.M. Inspector of Taxes)*[17] and *Mitchell Brothers* v. *Tomlinson*[18] had with respect therefore no relevance. In the opinion of the Special Commissioners, the shares were bought and the shares were sold, both in the course of trading in shares.

If I may so put it, the essential weakness, with respect, of Mr. Peddie's argument was that the appellant company was a financial house, to which share dealing was not merely incidental. I do not think that any one would argue against the lending of money from depositors' moneys being its main activity but in my opinion it would be to ignore the Articles of Association and the evidence to suggest that it could not and did not carry out other activities, all designed quite legitimately, to enrich the pockets of the shareholders. Their argument that the U.E.P. shares were not purchased with reserve funds or held by way of reserve funds therefore loses its validity. The moneys called up on October 20, 1964 were sufficient for the first two purchases; the third was financed by a loan. The deposits and the lending of moneys did not necessarily require the use of the shareholders' capital so long as the correct balance between the moneys received on deposit and the loans made was struck. And it was not an incorrect view open to judges of facts to take that using the capital to buy shares could in all the circumstances of the case be regarded as dealing in shares.

It would, I think, not be out of place to note that the case of the *Commissioners of Inland Revenue* v. *Livingston*[19] which induced Donovan L.J. to writing his dissenting judgment in the Court of Appeal in *J. P. Harrison (Watford) Ltd.* v. *Griffiths, supra,* was considered by Lord Guest in the House of Lords and found by him not to have the effect the learned Lord Justice put on it. As Lord Guest said at pages 303-304:

"A number of citations from cases were quoted in order to show that to ascertain whether there was trading it was relevant to look at the object, result or intention of the activity (see, for example, *Commissioners of Inland Revenue* v. *Livingston,* 11 T.C. 538 *per* Lord President Clyde at pages 542-3; *Commissioners of Inland Revenue* v. *The Stonehaven Recreation Ground Trustees,* 15 T.C. 419, *per* Lord President Clyde at page 426). No doubt if it is established that a transaction is entered into with the evident intention of making a profit, that may be a strong indication that the company was trading. But the corollary by no means follows that the absence of an intention to make a profit, or the intention to make a loss, negatives trading. The test is an objective one. The question to be asked is not, *quo animo* was the transaction entered into, but what in fact was done by the company (see *Commissioners of Inland Revenue* v. *Incorporated Council of Law Reporting,* 3 T.C. 105, *per* Coleridge C.J. at page 113; *Carnoustie Golf Course Committee* v. *Commissioners of Inland Revenue,* 14 T.C. 498, *per* Lord President Clyde at page 510).

I therefore conclude that neither the fact that the company intended to make a fiscal advantage out of the transaction negatives trading. In my opinion one has to look at the transaction by itself irrespective of the object, irrespective of the fiscal consequences, and ask the question in Lord President Clyde's words in *Livingston's* case:

'[are] the operations involved ... of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made'?

The company had power to deal in shares, it bought shares, it received a dividend on these shares, it sold the shares. This was just the ordinary commercial transaction of a dealer in shares. I ask myself the question put by Lord Radcliffe in *Edwards* v. *Bairstow,* [1956] A.C. 14, at page 37:

'What detail does it lack that prevents it from being an adventure in the nature of trade, or what element is present in it that makes it capable of being aptly described as anything else?'

What is it if it is not trade? In my view the transaction in question was an adventure in the nature of trade, and the Commissioners had no grounds upon which they could hold that it was not."

With respect, I am of opinion that there was evidence to support the Special Commissioners' finding and neither they nor the learned judge had made any mistake as to the law. The first order of the Special Commissioners must be confirmed.

The second limb of the appeal is in respect of the learned judge's decision to reverse the order of the Special Commissioners allowing the losses suffered by the appellant company's Singapore office to be set against its income in Malaysia. It was said that no dispute arose as to the factum or the quantum of the losses though as remarked by Mr. Peddie for the appellant company the figure of such losses did not appear anywhere in the record of the proceedings.

The successful contention of the appellant company before the Special Commissioners on this Singapore loss was briefly that the assessment of the appellant company's chargeable income on a world income basis in accordance with section 3(a) of the Income Tax Act 1967 must take into account the losses sustained by the Singapore branch.

The Special Commissioners as appeared in the case stated accepted the view that since section 3 of the Income Tax Act 1967 provided for the income tax of a person ordinarily resident in Malaya upon his income wherever derived, all profits and losses wherever derived or sustained should be brought into account in the ascertainment of his total income for the year of assessment.

The argument of the appellant company was said to be the application of the ordinary accounting principles in the determination of a taxpayer's income: *per* Lord President Clyde in *Whimster & Co. Ltd.* v. *I.R.C.*[20] It was further contended in support that under the world income scope a taxpayer was bound to include in his statement of account all profits wherever derived and he could then claim for such relief from double taxation as was open to him. This obligation to include income was said to found the right to claim for losses.

A great deal of the argument in the High Court and before us was devoted to the consideration whether the double taxation agreements entered into between Singapore and Malaysia did or did not take the Singapore losses outside the provision of possible deductions under the Act. This consideration involved the further point whether the Double Taxation Relief (Republic of Singapore) Order 1966 was in force for the year of assessment 1968 in which year the Singapore losses were incurred. The contention of the appellant company was that it was not in force. The pertinent submission of Revenue was that it was.

As to this I am now relieved from having to consider the law and I can rely on the decision of Gill F.J. (as he then was) in *Director-General of Inland Revenue* v. *E.D.C.*[21] that the 1966 D.T.A. Agreement was in force for the year of assessment 1968. He reached that conclusion without benefit of the amendment in P.U.(A) 211 dated July 25, 1973. The Federal Court has now by a majority upheld his decision holding that this amendment was intended to rectify an obvious omission and was retrospective: see [1974] 2 M.L.J. 65. I am aware that the last word in the matter may not have been said as *E.D.C.'s* case is, I understand, going to the Privy Council, but as at present advised I must follow the decision of the Federal Court: *Young* v. *Bristol Aeroplane Co., Ltd.*[22]

Therefore, I hold that for the year of assessment 1968 the relevant statutory provision for the determination of a chargeable income is the 1967 Income Tax Act and for relief against double taxation the applicable agreement was the Double Taxation Relief (Republic of Singapore) 1966, in short the 1966 DTA.

It was further contended by the appellant company that the 1966 DTA if in force for the year of assessment 1968 had no relevance whatsoever. What it has incurred were losses. There was no income for which it could claim relief. It has therefore not claimed any relief; it could not do so in respect of a loss, and it could not see or understand how the 1966 DTA agreement came into the picture.

Revenue however contended that the 1967 Income Tax Act must be read together with the 1966 D.T.A. and submitted that on such a reading, there were 2 possible arguments. It first contended that the computation of a taxpayer's chargeable income must be ascertained by the provisions of the 1967 Income Tax Act. The reasoning was that the 1966 D.T.A. spoke only of profits and not of losses; since profits under Article IV were not to be taken into consideration, they should be disregarded. So also, *a fortiori*, losses.

Alternatively, the 1966 DTA by this same Article IV only provided that no further tax would be imposed in Malaysia on profits of the permanent establishment in Singapore, remitted to Malaya. The agreement itself was negotiated between and entered into by the respective governments under the provision of section 54 of the Income Tax Ordinance 1947, now repealed and replaced by the 1967 Income Tax Act. Under the Ordinance, taxation was on income derived in or remitted to Malaysia. Insofar as Singapore was concerned, relief was provided for profits earned in Singapore and remitted to Malaysia. When the 1966 D.T.A. was continued in force in 1968, *i.e.* after the coming into force of the 1967 Income Tax Act, that meant that for the year of assessment 1968, where the agreement applied, the world derivation scope was substituted for the local derivation and remittance bases of the old Ordinance.

On either view, the conclusion was said to be that losses could not be taken into consideration.

There is great attraction in the argument. The learned judge thought the view of the Special Commissioners wrong. He accepted the argument that the net effect of the decision of the Special Commissioners was that the losses of the Singapore branch were twice taken into consideration, once in Singapore and again in Malaysia.

With respect I agree. The appellant's case was very much that of eating the cake and wanting to keep it.

This conclusion did not, contrary to the submissions, do violence to any rule of construction, even the strict rules of construction of a taxing statute. Section 132 of the 1967 Income Tax Act provides that the 1966 D.T.A. be read together with the Act and that the agreement supersedes the relevant provisions of the Act so long as the order remained in force "notwithstanding any written law." I have earlier held that the 1966 D.T.A. was in force for the year of assessment 1968. The provision of Article XVII that the laws of each Contracting State shall continue to govern the taxation of income in that State except where express provision to the contrary is made, must in the absence of any such provision mean that the operative statute is the 1967 Income Tax Act. This is clearly so when clauses 2 and 3 of Article IV are read, as indeed they do, to mean that the Singapore branch was to be regarded as a distinct and separate enterprise engaged independently of the Malaysian office. The conclusion is therefore clearly that the losses in Singapore cannot be brought into account.

With respect, it must be borne in mind that under the remittance basis of the Income Tax Ordinance 1947 there was no bringing into account of the Singapore losses. Under the world derivation basis of the 1967 Income Tax Act, the profits of the Singapore branch became taxable again in Malaysia, though not remitted to Malaysia. However, the same relief to prevent double taxation of profits was continued into the year of assessment 1968. There could be similarly no taking into consideration the Singapore losses, in the absence of statutory provision.

Another consideration concerns the computation of the chargeable income in Malaysia. The tax law of Singapore is not necessarily and is not shown to be the same as Malaysia's. Allowable deductions need not be the same nor is the application of unabsorbed losses similar. To ask Malaysia to accept the figure of Singapore losses as determined in Singapore would be to derogate from the principle as prescribed in the 1966 D.T.A. that the taxation in Malaysia is to be determined by the tax law of this country.

I respectfully agree with the learned judge and would dismiss the appeal with costs.

Suffian L.P. and **Ong Hock Sim F.J.** concurred.

Appeal dismissed.

Solicitors: *Skrine & Co.*